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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE DISTRICT OF OREGON

10 VIVIAN L. BROOKS,

Civil No. 07-1193-AA
OPINION AND ORDER

11 Plaintiff,

12 vs.

13 MICHAEL J. ASTRUE,
Commissioner of Social Security,

14 Defendant.

15 _____
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AIKEN, Judge:

Claimant, Vivian Brooks, brings this action pursuant to the
Social Security Act (the Act), 42 U.S.C. §§ 405(g) and

1 1383(c)(3), to obtain judicial review of a final decision of the
2 Commissioner denying her application for Supplemental Security
3 Income (SSI) disability benefits under Title XVI of the Act. For
4 the reasons set forth below, the Commissioner's decision is
5 reversed and remanded for additional administrative proceedings.

6 **PROCEDURAL BACKGROUND**

7 Plaintiff protectively filed an application for SSI on
8 February 19, 2004. Tr. 79-82. Plaintiff alleged disability
9 beginning May 23, 1999 due to a Histrionic Personality Disorder,
10 Dysthymia, Personality-Conduct Disorder, and an Affective Mood
11 Disorder. Tr. 35-36. After the application was denied initially
12 and upon reconsideration. On November 10, 2004, plaintiff
13 requested a hearing. Tr. 54. On April 18, 2006, an
14 administrative law judge (ALJ) held a hearing. On June 20, 2006,
15 the ALJ issued an opinion finding plaintiff not disabled. The
16 Appeals Council then denied review. Tr. 7-10. Plaintiff filed
17 prior disability applications in 2001 and 2003, which were
18 denied, however plaintiff did not appeal those denials to an ALJ.
19 Tr. 27.

20 **STATEMENT OF THE FACTS**

21 Plaintiff is presently employed as a part-time care giver
22 for seniors, disabled persons and veterans. She works
23 approximately 80 hours a month for \$9.28 per hour. She has
24 worked at the job since October 2004. The ALJ ruled that this
25 work did not constitute substantial gainful activity as the
26 monthly amount was under the threshold. Tr. 566. Plaintiff
27 currently lives with her roommate. She last worked at a full-
28 time job in May 1987. She stopped working after she was injured

1 on the job at the restaurant where she worked as a waitress. Tr.
2 569.

3 STANDARD OF REVIEW

4 This court must affirm the Secretary's decision if it is
5 based on proper legal standards and the findings are supported by
6 substantial evidence in the record. Hammock v. Bowen, 879 F.2d
7 498, 501 (9th Cir. 1989). Substantial evidence is "more than a
8 mere scintilla. It means such relevant evidence as a reasonable
9 mind might accept as adequate to support a conclusion."
10 Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting
11 Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)).
12 The court must weigh "both the evidence that supports and
13 detracts from the Secretary's conclusions." Martinez v. Heckler,
14 807 F.2d 771, 772 (9th Cir. 1986).

15 The initial burden of proof rests upon the claimant to
16 establish disability. Howard v. Heckler, 782 F.2d 1484, 1486
17 (9th Cir. 1986). To meet this burden, plaintiff must demonstrate
18 an "inability to engage in any substantial gainful activity by
19 reason of any medically determinable physical or mental
20 impairment which can be expected . . . to last for a continuous
21 period of not less than 12 months. . . ." 42 U.S.C.
22 § 423(d)(1)(A).

23 The Secretary has established a five-step sequential
24 process for determining whether a person is disabled. Bowen v.
25 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1502,
26 416.920. First the Secretary determines whether a claimant is
27 engaged in "substantial gainful activity." If so, the claimant
28 is not disabled. Yuckert, 482 U.S. at 140; 20 C.F.R.

1 §§ 404.1520(b), 416.920(b).

2 In step two the Secretary determines whether the claimant
3 has a "medically severe impairment or combination of
4 impairments." Yuckert, 482 U.S. at 140-41; see 20 C.F.R.

5 §§ 404.1520(c), 416.920(c). If not, the claimant is not
6 disabled.

7 In step three the Secretary determines whether the
8 impairment meets or equals "one of a number of listed impairments
9 that the Secretary acknowledges are so severe as to preclude
10 substantial gainful activity." Id.; see 20 C.F.R.

11 §§ 404.1520(d), 416.920(d). If so, the claimant is conclusively
12 presumed disabled; if not, the Secretary proceeds to step four.
13 Yuckert, 482 U.S. at 141.

14 In step four the Secretary determines whether the claimant
15 can still perform "past relevant work." 20 C.F.R.

16 §§ 404.1520(e), 416.920(e). If the claimant can work, she is not
17 disabled. If she cannot perform past relevant work, the burden
18 shifts to the Secretary. In step five, the Secretary must
19 establish that the claimant can perform other work. Yuckert, 482
20 U.S. at 141-42; see 20 C.F.R. §§ 404.1520(e) & (f), 416.920(e) &
21 (f). If the Secretary meets this burden and proves that the
22 claimant is able to perform other work which exists in the
23 national economy, she is not disabled. 20 C.F.R. §§ 404.1566,
24 416.966.

25 DISCUSSION

26 1. The ALJ's Findings

27 In step one, the ALJ found that plaintiff had not engaged
28 in substantial gainful activity during the relevant time period.

Tr. 29. At step two, the ALJ found that plaintiff had the following severe impairments: affective disorder, pain disorder, anxiety disorder, and personality disorder. Tr. 29-30. At step three, the ALJ found that plaintiff had no impairment or combination of impairments that met or equaled one of the listed impairments in 20 C.F.R. pt. 404, subpt. P, app. 1. Tr. 30-31. At step three, the ALJ found that plaintiff retained the residual functional capacity (RFC) to perform all exertional levels of work and could understand and carry out simple tasks in a routine setting with no contact with the general public. Tr. 31-33. At step four, the ALJ found plaintiff had no past relevant work. Tr. 33. Finally, at step five, the ALJ found plaintiff could perform a significant number of other jobs existing in the national economy, including but not limited to packing line worker, janitor, and injection molding machine operator. Tr. 33-34.

2. Plaintiff's Allegations of Error

A. The ALJ Erred in Finding Plaintiff Did Not Establish Any Severe Physical Impairment

Plaintiff objects to the ALJ's step two finding that there was no evidence that plaintiff had any physical impairment that resulted in any significant work-related functional limitations for any 12-month period. Pl's Brief, p. 16-20.

Plaintiff has the burden of proving that she had a severe impairment, or combination of impairments, which lasted or was expected to last for a period of twelve months. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. §§ 416.905, 416.912. The Commissioner's rulings and regulations provide that an impairment will be found

1 disabling if it "significantly limits [plaintiff's] physical or
2 mental ability to do basic work activities." 20 C.F.R. §
3 416.920(c); SSR 96-3p. The term "basic work activities" is
4 defined as the abilities and aptitudes necessary to do most jobs.
5 20 C.F.R. § 416.921(b).

6 The ALJ relied on the opinion of one-time examining
7 physician, Dr. Webster, who said that plaintiff had a Somatoform
8 Disorder and found there is "unlikely to be an organic cause of
9 the woman's discomfort" based upon her "odd gait," "variety of
10 places she hurts," and "extraordinary variety of pain behavior."
11 Tr. 362-65. The ALJ stated:

12 In light of the examination with Dr. Webster in which
13 claimant displayed numerous inconsistencies and no
14 Physical diagnosis was reached, the undersigned
15 finds she has no severe physical impairment. While
16 she has been diagnosed with bursitis and tendinitis
 on various occasions, there is no evidence these
 impairments resulted in any significant work-related
 functional limitations for any 12 month period.

17 Tr. 30.

18 Dr. Webster indicated that he reviewed "some notes from her
19 primary care physician" noting depression along with pain in her
20 hips, buttocks and sacroiliac joints and treatment with
21 injections, Xanax and Vicodin. Tr. 362.

22 Plaintiff relies on the opinion of treating physician, Dr.
23 Chestnutt, along with the opinions of several treating Kaiser
24 doctors. Dr. Chestnutt treated plaintiff beginning May 11, 1998
25 until January 2002. Tr. 300-310. Dr. Chestnutt diagnosed
26 Thoracic Outlet Syndrome (TOS) in plaintiff's right arm. Tr.
27 309-10. Dr. Chestnutt wrote:
28

1 The physical findings are both real and significant,
2 and have caused significant disability by themselves,
3 but have certainly caused her significant distress and
4 emotional distress. These have been very difficult to
5 treat medically since they are affecting her pelvic
6 bones, muscles, and ligaments. She sustained ligamentous
7 injury in her sacroiliac joints, as well as in her
8 back, neck and head These specific injuries
9 are well outlined in a note from a visit with Ms.
10 Brooks on September 24, 2001 [Tr. 303-04] . . . but
11 in summary she does have significant dysfunction,
12 myofascial that is, dysfunction in her pelvis, as
13 well as her low back and her hips. These are the most
14 significant areas, although she has some additional
15 issues in her legs, shoulders, and neck that are
16 related.

17 Tr. 301.

18 Additional progress and treatment notes from Dr. Chestnutt
19 and Oregon Health Sciences University (OHSU) from September 28,
20 2001, through June 17, 2004, document treatment for hip pain, leg
21 pain, back pain and depression. Tr. 242-279. On May 22, 2002,
22 plaintiff was again examined by Dr. Chestnutt, who assessed
23 probable neuritis in her foot, possibly due to a Morton's
24 neuroma. She also had continuing left leg pain and moderately
25 severe depression. On September 30, 2002, Dr. Chestnutt
26 described plaintiff as being in "significant psychological
27 distress." He changed her medications at that time. Tr. 264.
28 On January 16, 2003, Dr. Chestnutt examined plaintiff and
diagnosed trochanteric (hip) bursitis, back pain, left thigh
numbness, leg weakness and instability, among other issues. Tr.
257. Plaintiff was given a medication (injection) for the
trochanteric bursitis. On February 13, 2003, Dr. Chestnutt gave
plaintiff another injection in her right sacroiliac joint and
noted she had trouble balancing, difficulty ambulating and used
a cane. She had fallen "periodically." Tr. 254. Dr. Chestnutt

1 diagnosed: bilateral hip and buttock pain and sacroiliac joint
2 pain, ataxia due to mechanical issues; and anxiety and
3 depression. Id.

4 Plaintiff was then treated at Kaiser East Moreland from
5 February 17, 2006, through May 6, 2006 for depression,
6 trochanteric bursitis, and arthralgia of the shoulder. Tr. 474-
7 534. On April 6, 2006, plaintiff underwent an outpatient
8 consultation for right hip pain, right foot and ankle pain, right
9 knee pain, right shoulder pain and low back pain. Tr. 493-96.
10 Dr. Kim performed a physical examination and reviewed prior x-
11 rays. He opined that plaintiff's shoulder pain was most likely
12 acromioclavicular joint arthritis, along with probable bicipital
13 tendonosis or tendinitis, as well as tendonosis or tendinitis.
14 Plaintiff's low back pain was most likely secondary to sacroiliac
15 joint pain. The hip pain was likely secondary to iliotibial band
16 syndrome and possibly also worsening trochanteric bursitis. Her
17 knee pain was also found to be related to plaintiff's iliotibial
18 band syndrome. Id.

19 The ALJ acknowledges that both Dr. Chestnutt and the Kaiser
20 physicians diagnosed plaintiff with trochanteric bursitis and
21 lateral epicondylitis (damaged tendons causing elbow and forearm
22 pain). Tr. 29-30. After x-rays were administered at Kaiser in
23 January 2006, treating doctors diagnosed plaintiff with shoulder
24 pain likely secondary to acromioclavicular joint arthritis and
25 bicipital tendinitis, as well as supraspinatus tendonosis or
26 tendinitis. Tr. 30. The ALJ fails to provide any reasons for
27 rejecting these treating doctors' opinions, other than the
28 comment: "while she has been diagnosed with bursitis and

1 tendinitis on various occasions, there is no evidence these
2 impairments resulted in any significant work related functional
3 limitations for any 12 month period." Id. While true that the
4 treating physicians did not complete a RFC assessment form,
5 whether plaintiff's impairments result in any functional
6 limitations is unknown from the record. Further, medical reports
7 are designed to promote medical treatment and not document
8 disability factors, therefore the lack of functional assessment
9 in the medical reports is not significant or determinative of
10 disability. The Ninth Circuit holds that "[w]hen an examining
11 physician relies on the same clinical findings as a treating
12 physician, but differs only in his or her conclusions, the
13 conclusions of the examining physician are not "substantial
14 evidence." Murray v. Heckler, 722 F.2d 499, 501-02 (9th Cir.
15 1983). That is the situation at bar. The ALJ erred by
16 dismissing the opinions of plaintiff's treating physicians
17 regarding her physical limitations and accepting Dr. Webster's
18 opinion without providing specific and legitimate reasons for
19 doing so supported by substantial evidence in the record. Lester
20 v. Chater, 81 F.3d 821, 830 (9th Cir. 1995) (internal quotation
21 omitted). The ALJ had a duty to contact plaintiff's doctors to
22 assess her physical limitations pursuant to his duty to develop
23 the record. See 20 C.F.R. § 404.944 ("[a]t the hearing, the
24 [ALJ] looks fully into the issues, questions you and the other
25 witnesses, and accepts as evidence any documents that are
26 material to the issues."); 20 C.F.R. § 416.912(e) ("we will seek
27 additional evidence of clarification from your medical source
28 when the report from your medical source contains a conflict or

The Commissioner's decision is not based on substantial evidence. Therefore, this case is reversed and remanded for additional administrative proceedings as outlined above.

IT IS SO ORDERED.

/s/ Ann Aiken
Ann Aiken
United States District Judge